PATHMA NAGANATHER & ANOR

v.

NIVEDITA NAGANATHER

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: W-02-540-2004]
28 SEPTEMBER 2005

CIVIL PROCEDURE: *Appeal - Fact, findings of - Decision of trial judge - Whether relevant facts considered in reaching decision - Appellate intervention, whether warranted - Transfer of land and consideration - Consent judgment and res judicata*

This was an appeal by the plaintiffs from the decision of the High Court dismissing their action for a declaration that a certain plot of land ('the land') – now registered in the name of the defendant – is being held by the defendant in trust on behalf of the children and the wife ('Mdm Manickam') of one Naganather ('the deceased'). The plaintiffs and the defendant are the children of the deceased. In coming to his decision, the learned judge accepted the defendant's version that she had paid: (i) a sum of RM12,000 to her brother ('Kandasamy') – who held a half share in the land – as consideration for the transfer of the said half share to her; and (ii) a sum of RM90,000 to Mdm Manickam (her mother) – who held the other half share in the land – as consideration for the transfer of the said other half share to her.

Held (dismissing the appeal)
Per Augustine Paul JCA delivering the judgment of the court:

[1] This appeal was wholly grounded on the findings of fact made by the trial judge in the High Court. (*Clarke v. Edinburgh Tramways Co* [1919] SC 35 followed.) The learned judge had dealt with the material points which were relevant to the resolution of the issues in dispute between the parties. He took into consideration, *inter alia*, the exhibit which clearly showed that Mdm Manickam did receive the sum of RM90,000 from the defendant as well as the evidence leading up to the affirmation of the statutory declarations which supported the defendant's ownership of the land. The learned judge had correctly considered the necessary evidence to support his conclusions. (pp 555 c-h & 556 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan plaintif dari keputusan Mahkamah Tinggi yang menolak tindakan mereka untuk satu deklarasi bahawa sepetak tanah ('tanah tersebut') – yang kini didaftar dalam nama defendan – adalah dipegang oleh defendan dalam amanah untuk pihak kanak-kanak dan isteri ('Mdm Manickam') satu Naganather ('simati'). Plaintif dan defendan adalah anak-anak simati. Dalam mencapai keputusannya, hakim yang arif menerima versi defendan bahawa beliau telah membayar: (i) satu jumlah sebanyak RM12,000 kepada abangnya ('Kandasamy') – yang memegang setengah bahagian dalam tanah tersebut – sebagai balasan untuk pemindahan bahagian tersebut kepadanya; dan (ii) satu jumlah sebanyak RM90,000 kepada Mdm Manickam (ibunya) – yang memegang setengah bahagian yang lain dalam tanah tersebut – sebagai balasan untuk pemindahan bahagian yang lain itu kepadanya.

Diputuskan (menolak rayuan tersebut)
Oleh Augustine Paul JCA menyampaikan penghakiman mahkamah:

[1] Rayuan ini berasas sepenuhnya ke atas dapatan fakta yang dibuat oleh hakim perbicaraan dalam Mahkamah Tinggi. (*Clarke v. Edinburgh Tramways Co* [1919] SC diikuti.) Hakim yang arif telah menimbang perkara-perkara material yang relevan kepada penyelesaian isu-isu yang dipertikaikan oleh pihak-pihak. Beliau telah mempertimbangkan, inter alia, eksibit yang menunjukkan dengan jelas bahawa Mdm Manickam telah menerima satu jumlah sebanyak RM90,000 dari defendan, dan juga keterangan yang membawa kepada affirmasi deklarasi statut yang menyokong pemilikan tanah tersebut oleh defendan. Hakim yang arif telah mempertimbangkan keterangan yang perlu untuk menyokong kesimpulannya.

Case(s) referred to:
Clarke v. Edinburgh Tramways Co [1919] SC 35 ***(refd)***

Legislation referred to:
National Land Code, s. 89(a)

For the appellants - Atma Singh Veriah (DR John with him); M/s Atma Singh Veriah & Co
For the respondent - A Kanesalingam (K Shanmugam with him); M/s Kanesalingam & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S2-22-189-2000]

Reported by Gan Peng Chiang

JUDGMENT

Augustine Paul JCA:

In this case land held under Grant No 26496 Lot 211, Section 96, Kuala Lumpur ("the land") is now registered in the name of the defendant. The plaintiffs prayed for a declaration, *inter alia*, that the land is held by the defendant in trust, on behalf of the children, except for Ishwari, of Naganather ("the deceased") and his wife, Manickam.

The plaintiffs and the defendant come from a family of six children. Their father is the deceased who passed away in 1960. He had purchased the land prior to his demise. It was registered in equal shares in his name and that of Kandasamy, the eldest son in the family. After the death of the deceased his half share in the land was transferred into the name of his wife, Manickam. All the children had renounced their rights to the land in favour of their mother in consideration of love and affection by executing deeds of renunciation. The learned High Court Judge found that this half share had been transferred to Manickam pursuant to a court order dated 10 December 1982. The transfer to Manickam was registered on 4 January 1983. Kandasamy was declared a bankrupt and his half share vested in the official assignee. In 1962 this half share was transferred to the defendant. She was duly registered as the owner of the half share. The defendant led evidence to show that she had paid RM12,000 to Kandasamy as consideration for the transfer. The transfer was witnessed by one Seenivasagam who affirmed a statutory declaration on 29 May 1998 to that effect. The plaintiffs alleged that the sum of RM12,000 was never paid by the defendant to Kandasamy. The learned High Court Judge did not accept the evidence of the plaintiffs in view of the contents of the statutory declaration affirmed by Seenivasagam and the fact that the defendant is the registered owner gave her a vested right to the land under s. 89(a) of the National Land Code.

In 1983 the defendant purchased the half share in the land held by Manickam with a Government Housing Loan that she had obtained. Thus the whole land was registered in the defendant's name. It was the contention of the Plaintiffs that the purchase money obtained from the Government Housing Loan was spent by the defendant herself and not given to Manickam. On the other hand the defendant produced a receipt (exh. D31) issued by a law firm to show that a payment of RM90,000 was received by Manickam. Subsequently the defendant transferred the land to the second plaintiff upon receipt of a part-payment of RM185,000. The second plaintiff failed to pay the balance sum of RM450,000 to complete the transfer. The defendant demanded that the land be returned to her. A consent judgment was entered into between them

pursuant to which the defendant was to return the sum of RM185,000 to the second plaintiff who in turn was to re-transfer the land to the defendant. In the suit that led to the consent judgment the first plaintiff, a teacher, had affirmed a statutory declaration saying that the land belongs to the defendant. This declaration was prepared by an advocate and solicitor (DW3) who said that its contents were explained to the first plaintiff. A similar declaration was affirmed by Sivananda Dewi, a doctor. The learned High Court Judge did not accept the denial of the contents of the two statutory declarations by the first plaintiff. Accordingly, the claim of the plaintiffs was dismissed with costs. This appeal is by the plaintiffs.

It must be observed that this appeal is essentially grounded on findings of fact made by the learned trial judge. In dealing with a complaint against the judicial appreciation of evidence by a trial court we are guided by the speech by Lord Shaw in *Clarke v. Edinburgh Tramways Co* [1919] SC 35 at p 36:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expression, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In our opinion the learned trial judge had dealt with the material issues which are relevant to resolve the issues in dispute. He had taken into consideration exh. P31 which clearly showed that Manickam had received the sum of RM90,000 from the defendant as opposed to the contention of the plaintiffs that it was not. He had considered the circumstances that led to the consent

judgment between the second plaintiff and the defendant. In connection with this judgment he had evaluated the evidence leading to the affirmation of the statutory declarations affirmed by the first plaintiff and Sivananda Dewi where they had acknowledged that the land belongs to the defendant. It was therefore our view that the learned trial judge had correctly considered the necessary evidence to support his conclusion. We can only add that it is illogical for the second plaintiff to now argue that the land is trust property when he, while claiming to be a beneficiary, had attempted to purchase it. The attempt is a clear indication that the defendant was its beneficial owner. However, the consent judgment cannot operate as *res judicata* in respect of the present action as there was no determination by agreement or otherwise on the question of whether the land is held on trust by the defendant. It merely reverted the rights of the parties to the question that existed prior to 1992. The capacity in which the land was held at that time is a question of fact which has been determined by the learned trial judge in favour of the defendant. His reliance on the consent judgment as *res judicata* therefore does not alter the final outcome of the case. Accordingly, we dismissed the appeal with costs.